Appendix 1

United States Court of Appeals
For the Ninth Circuit

No. 21,252

William F. Scanlan,
Appellant,
vs.
Anheuser-Busch, Inc., a corporation, et al.,
Appellees.

ORDER STAYING ISSUE OF MANDATE

Upon application of J. Albert Hutchison, counsel for the appellant, and good cause therefor appearing, it is ordered that the issuance, under Rule 26 of the mandate of this Court in the above cause be, and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the appellant herein, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before April 10, 1968. In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final dispo-

sition of the case by the Supreme Court of the United States.

We will prepare a certiorari record when directed to do so.

Dated, San Francisco, California,
March 12, 1968.

Charles M. Merrill,
United States Circuit Judge.

Filed March 13, 1968,
Wm. B. Luck, Clerk.

Appendix 2

Office of the Clerk
U. S. Court of Appeals
P. O. Box 547
San Francisco, California 94101

March 5, 1968

J. Albert Hutchinson, Esq.
Attorney at Law
55 New Montgomery St.
San Francisco, Calif. 94104

Dear Sir:

The Petition for a Rehearing heretofore filed in case No. 21,252—William F. Scanlan vs. Anheuser-Busch, Inc., a Corporation, was this day denied.

Pursuant to Rule 26 and unless by the order of the Court, a certified copy of the judgment of this Court under said Rule will be due to issue on the expiration of five (5) days from the date hereof.

Time for certiorari petition: Civil cases, 90 days; Criminal cases, 30 days.

Sincerely,
Wm. B. Luck, Clerk.

Appendix 3

United States Court of Appeals
For the Ninth Circuit

No. 21,252

William F. Scanlan,
Appellant,
vs.
Anheuser-Busch, Inc., a corporation, et al.,
Appellees.

[January 11, 1968]

On Appeal from the United States District Court for the Northern District of California, Northern Division

Before: POPE, HAMLEY and MERRILL, Circuit Judges

MERRILL, Circuit Judge:

Appellant has brought suit against appellee alleging breach of a contract of distributorship, unfair competition and violation of state and federal antitrust laws. He appeals from a judgment of dismissal by the District Court following directed verdict. The question before us is whether, upon any of his claims,

an issue remains for the jury. Finding no such issue, we affirm.

Appellee is a brewery with nationwide distribution of its products: Budweiser and Michelob premium beers and Busch Bavarian, a popular-priced beer. Appellant is a beer distributor located in Stockton, California. Prior to 1961 appellee's premium beers were distributed throughout San Joaquin County, California, by Fred Barosso, while appellant was distributor of the popular-priced Hamm's beer. In 1961 Barosso suggested to appellant that the two distributorships be combined. Appellant was not interested in this proposal but did agree to an arrangement whereby he purchased certain of Barosso's assets for $10,000, employed Barosso and took over his distributorship of Budweiser and Michelob.

Prior to 1963 appellee had not entered the highly competitive Pacific Coast market in popular-priced beer. In that year it determined to enter the market with Busch Bavarian. Appellant was offered the San Joaquin County distributorship but declined, feeling that his position as dealer for Hamm's, a competing beer, might thereby be prejudiced. Appellee then sought to find a San Joaquin County dealer for Busch Bavarian, but without success. Apparently the generally accepted view in the industry was that no beer wholesaler in the Stockton area could operate profitably handling Busch Bavarian alone.

Appellee finally found, in Dinubilo & Sons, a liquor dealer interested in a beer distributorship, provided

it could handle the whole Anheuser-Busch line of beers. Appellee thereupon terminated appellant's dealership in Budweiser and Michelob and entered into a dealership arrangement with Dinubilo & Sons. Barosso left appellant's employ and took employment with Dinubilo & Sons.

Appellant's first contention is that appellee's action in terminating his dealership of Budweiser and Michelob was a breach of an oral contract that his dealership was terminable only for cause. There was no evidence of such a contract. The evidence, on the contrary, was clearly to the effect that appellee would deal with appellant only on the basis of a buyer-seller relationship, order-to-order, terminable at the will of either party. Three letters were introduced in which appellant specifically acknowledged prior to his assumption of the Budweiser-Michelob distributorship, that this would be the relationship between the parties. No issue remained for the jury respecting this contention. See *Anheuser-Busch, Inc. v. Jefferson Distributing Co.*, 353 F.2d 956 (5th Cir. 1955); *Roehm Distributing Co. v. Burgermeister Brewing Co.*, 196 Cal.App.2d 678, 16 Cal.Rptr 881 (1961).

Appellant next contends that appellee engaged in unfair competition in soliciting Barosso away from him and utilizing his knowledge of appellant's customers.

Appellee's first contact with Barosso was initiated by Barosso himself. He had been serving the territory for distributors of Anheuser-Busch products for over 20 years. He had not sold his business or goodwill to

appellant (only certain business assets), and had not made any covenant not to compete. He induced no other employees to leave appellant's firm. The identity and requirements of San Joaquin County beer retailers was certainly not confidential information but was available to anyone. See *American Loan Corp. v. California Commercial Corp.,* 211 Cal.App. 2d 515, 27 Cal.Rptr. 243 (1963). There simply are no facts upon which to base a claim of unfair competition in this respect.

Since this claim fails, it provides no basis for appellant's claim that there was a conspiracy between the brewer, Barosso, and Dinubilo & Sons to drive appellant out of business that violated § 1 of the Sherman Act. Nor would such a conspiracy to substitute one distributor for another, even if proven, violate the antitrust laws. See *Perryton Wholesale, Inc. v. Pioneer Distributing Co.,* 353 F.2d 618, 622 (10th Cir. 1965), *cert. denied,* 383 U.S. 945 (1966).

Finally, appellant contends that in two other respects the termination of his Budweiser-Michelob dealership volated antitrust laws. First he contends that his dealership was terminated because of his refusal to cease handling Hamm's, and that this action was taken pursuant to a conspiracy between appellee and certain of its Pacific Coast distributors, in violation of §1 of the Sherman Act, 15 U.S.C. §1, to eliminate wholesale outlets for competing popular-priced beers and leave a clear field for Busch Bavarian. He relies upon *Walker Distributing Co. v. Lucky Lager Brewing Co.,* 323 F.2d 1 (9th Cir. 1963).

The District Court determined that there was no evidence that appellee sought to have appellant abandon his dealership of Hamm's, but that the evidence was quite to the contrary. We agree. From appellant's own testimony it appears that appellee had stated that appellant would not be expected to give up distribution of Hamm's; that the expressed attitude of Hamm's was that it would neither approve nor disapprove of appellant's handling of Busch Bavarian and that the decision would have to be appellant's; that appellant ultimately decided to take no chance on losing Hamm's and that to take on Busch Bavarian would constitute an undue risk to his Hamm's distributorship.

Thus, appellant's loss of Budweiser and Michelob was not due to any *Walker*-type conspiracy to boycott competing beers. This case rather is comparable to *Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F. 2d 283 (6th Cir.) cert. denied, 375 U.S. 922 (1963), which makes it clear that a mere unilateral change of distributors by a brewer, having no effect on the availability of competing products, does not violate the Sherman Act. *Cf. United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

Second, appellant contends that appellee violated §1 of the Sherman Act and §3 of the Clayton Act, 15 U.S.C. §14, by refusing to make Budweiser and Michelob available to wholesale outlets unless the latter also distributed Busch Bavarian; that it was unlawfully using the economic power it possessed through control of its premium beers to free its

popular-priced beer from the normal competitive stress of the open market.

There is a complete absence of evidence to establish a general conspiracy to create a "tying" arrangement between appellee and its distributors.

But, further, it is abundantly clear that appellee was not attempting to secure a competitive advantage through tying Busch Bavarian to Budweiser and Michelob in the instant case. It was only through transferring all three brands to another distributor that Busch Bavarian could enter the competitive arena at all in San Joaquin County. As stated in *Brown v. Western Massachusetts Theaters, Inc.*, 288 F.2d 302, 305 (1st Cir. 1961), "the antitrust laws do not require a business to cut its own throat." We may add that they do not require a business to refrain from entering a competitive market. A course of conduct which thus increases rather than diminishes competition, benefiting rather than injuring the public, is not condemned under the Sherman or Clayton Acts.

Affirmed.

Appendix 4

DEFENDANTS' MOTION FOR A DIRECTED VERDICT.

"Mr. Hanger: If the Court please, the Plaintiff having rested his case, we come before this Court again to ask the Court to take the case away from the Jury, and on behalf of all of the Defendants I wish at this time to move for a directed verdict and in so far as there may remain any so-called equitable issues in the case I believe the motion properly should be to dismiss the Complaint so I make the joint motion to the Court at this time on the ground that we are not here now with affidavits. We have had some eight days of testimony, a number of live witnesses, a number of exhibits put in the record, and it is my belief, and I so urge on behalf of all the Defendants, that taking all facts which the Plaintiff has proved in this case, and considering all of the reasonable inferences that one might draw from these facts, it is clear that the Plaintiffs have not proved a cause of action on any of their three stated theories.

Now, at this point, your Honor, I will indicate that in so far as the individual defendants are concerned, as I read the Complaint they are only named in the third cause of action, the one having to do with the so-called unfair competition, and the solicitation of Plaintiff's employees and agents, the first and second and fourth causes of action by the terms of the Complaint are addressed to the Corporate Defendant alone, so that my motion with respect to the individual Defendants pertains to the third cause of action with respect to the corporate defendant, Anheuser-Busch, to all causes of action." (RT 1052:7-1053:8.)

Appendix 5

ABSTRACTS OF ORDER GRANTING MOTIONS FOR DIRECTED VERDICT AND JUDGMENT ON DIRECTED VERDICT.

1. Order Granting Motions for Directed Verdicts.

"This cause came on to be heard on the motions of defendants, and each of them, for a directed verdict, and the Court having heard the argument of counsel and being fully advised, it is hereby

Ordered, the motions of defendant Anheuser-Busch, Inc. for a directed verdict on the first, second, third and fourth causes of action in plaintiff's complaint are granted, and it is further . . ." (CT 576.)

2. Judgment of Dismissal.

"Now, after hearing arguments of the attorneys, the motions for directed verdicts and for dismissal of the complaint were granted, and the Court having ordered that judgment be entered herein in accordance therewith and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is ordered by the Court that plaintiff take nothing by these actions, that the complaint be dismissed, . . ." (CT 579.)

Appendix 6

ABSTRACTS OF PETITION FOR REMOVAL AND MOTION FOR ORDER REMANDING CAUSE TO STATE COURT.

1. Petition for Removal.

"4. The complaint also purports to name as *defendants John Flanigan, George Elliott, George Newhouse, George Liokos and Richard O'Shaney, all of whom were at the time of the commencement of said action, at all times thereafter have been and now are, residents of the State of California* and employees of defendant Anheuser-Busch, Inc. *Any thing or act* alleged in the complaint to have been done or omitted by any of said defendants Flanigan, Elliott, Newhouse, Liokos and O'Shaney, if done or omitted at all, *was done or omitted* by said defendants, or any of them, *in the course and scope of their employment with Defendant Anheuser-Busch, Inc.*" (CT 2.)

2. Motions for Order Striking Portions of Petition for Removal and for Order Remanding Cause to Court Where Action Was Commenced.

"William F. Scanlan, plaintiff above-named, moves the above-entitled Court for its order striking from petition for removal on file herein the following portions thereof:

* * *

2. The so-called defendants Flanigan, Elliott, Newhouse, Liokos and O'Shaney are not actual parties but are merely nominal and formal defendants and their purported joinder as defendants is sham and a fraudulent device to impede petitioner's right

of removal and is made in bad faith with no intent on the part of plaintiff to obtain a judgment against anyone but the petitioner. *Said defendants are charged by* the allegations of the complaint, if at all, *only in plaintiff's alleged third cause of action. . . .*

Said motion is based upon the ground that said *quoted portions of said petition are conclusions of law, sham and scandal,* and is further based upon said petition for removal, all the pleadings and papers on file in the cause, upon this motion, notice of hearing, and the statement of reasons and points and authorities appended hereto.

Plaintiff further moves said Court for its order *remanding the above-entitled cause to the Superior Court* of the State of California, in and for the County of San Joaquin, upon each of the grounds provided and set forth in Title 28, Section 1447, United States Code, and particularly in that—

1. *The cause was removed improvidently; and*
2. *The Court is without jurisdiction of the cause.*

Said motion is based upon the petition for removal, all the papers and pleadings on file in the cause, upon this motion, notice of motion, and the statement of reasons and points and authorities appended hereto."

(Certificate of Clerk, item 10.)

Appendix 7

ABSTRACTS OF TESTIMONY OF WILLIAM F. SCANLAN (RT 208-216, 226, 228-229).

"Q. Following the luncheon you did have a particular meeting then with Mr. Elliott and Mr. Flanigan?

A. Yes, yes, I did, at 1:00 o'clock was my scheduled time.

Q. Now, was this in an office or suite of rooms, residential rooms in the hotel?

A. It would be a suite of rooms in the Fairmont Hotel.

Q. Was anyone else present other than the two of you—the two of them and yourself?

A. No, that was all that was there.

Q. Now, omitting the pleasantries and casual remarks, would you give us, as best you recall, the discussion in so far as it related to the business of the brewery and affected you that preceded, indicating if you can, each individual who spoke and the substance of what they had to say?

A. Yes. I was brought into this room and seated and Mr. Flanigan took the floor and told me, 'Bill, you know what this is all about and we are coming with Busch Bavarian.' And I said, 'Fine.' And I sat attentively and listened. He had a chart listing all of the California breweries in their sales or their sales position as far as barrels or gallonages are concerned, showing their position or whether they was in a plus position for the previous year, for 1962, or whether

they was in a down position where each brewery stood in the industry as far as California sales were concerned. He went over this quite thoroughly and pointed out all the weaknesses in some and the strength in one.

* * *

Q. Do you recall how Mr. Flanigan requested your views; do you remember how he put it?

A. Yes, he did. He made the statements, and he said, 'You can see our position that *all these California breweries, with the exception of Hamm's, are down in sales, and this looks like our opportune time to move into the California beer market. Some of these breweries are getting pretty weak and some of them won't survive.*'

* * *

Q. Now, was anything further said about your views or your activity, if any, in respect to the introduction of the Busch Bavarian brand in your territory?

A. Yes, he did. He says, 'Now, we're coming with this program and *we expect all of our wholesalers to give up something.*'

Q. This was Mr. Flanigan?

A. Yes, Mr. Flanigan.

Q. Was he more specific in any of his remarks at that time as to what the 'something to be given up' might be?

A. Well, yes. He says that 'We realize because we are a premium priced beer up till now that *we are in with every brand of beer listed on this chart or in the*

State of California, and coming with this *we are going to upset the whole beer business because we are in with some brand in almost every wholesalership in the State of California.'*

Q. Now, in respect to the—in respect to your views as to your territory, were those requested or solicited by either of these gentlemen?

A. Well, my views, or they had some projected figures for the sale of Busch-Bavarian.

Q. In San Joaquin County?

A. Yes, for San Joaquin County.

Q. Do you recall the approximate projection, the amount in cases, or whatever other measure it might be?

A. Yes, I do. They had a projected sales figure of 88,000 cases of Busch Bavarian for that year plus a 45,000 known sales of Budweiser the previous year.

Q. Now, did they ask your views as to the likelihood of attaining that amount of sales or anything of that nature?

A. Yes. I listened to them and told them at that time that their anticipated sales or their projected sales, that there was just no way that any beer wholesaler could make a go of anything like this in the Stockton market. It was—conditions were too hard and too tough and they just didn't have enough boxes or cases slated for a wholesaler to even come close to making it.

Q. Now, in that connection, did you call to their attention or they call to yours, the sale of Hamm's or any other beer being sold in San Joaquin County?

* * *

A. I told them it was an impossible situation for me *to even consider dropping a brand of beer like Hamm's,* that I was selling in excess of 200,000 cases for an unknown 88,000 anticipated sales plus 45,000 known sales, and I am taking a big pay cut and going bankrupt on this basis.

Q. What, if anything, was said in response to that statement, if there was any, by either of the other men?

A. Yes. John replied and he said, 'Well, Bill, maybe we got our sights set too high then in this situation. As far as you dropping Hamm's maybe that would be—we couldn't expect you then to do it under these——'

Mr. Hutchinson: He's speaking to the witness.

The Court: Who was it who said that,—Flanigan?

The Witness: This would be John, yet, John talking to me.

The Court: John Flanigan. I am sorry. Go ahead.

* * *

The Witness: Yes. John told me that maybe that their analysis of it was wrong and they couldn't expect me then under those situations—they *knew that no one was going out and commit suicide, financial suicide, that way* and that they, or we better look the situation over a bit closer.

* * *

Q. Now, did anything develop with respect to any arrangements by which *you would attempt to keep Hamm's and also take on Busch Bavarian with the Budweiser and Michelob beers that you were already handling?*

A. No. They told me at that time that they didn't expect an answer right then off me but we discussed the possibilities of different ways to do it.

Q. Now, *was anything said about having a so-called separate operation of some sort?*

A. *Yes, there was.*

* * *

Q. What, if anything, was said about how it would be handled *if it should be carried out, that is, a separate operation;* were you to operate it, or what was the case?

A. *They told me that they wanted a separate operation then with only Anheuser-Busch products on the trucks and nothing under that roof but their products.*

Q. What was said, if anything, about associating personally or your name being associated with such a separate operation if it developed?

A. Well, I mentioned the possibility that maybe I could take Fred Barosso over there and make him the manager of the operation and maintain my present facilities and just have the two warehouses side by side.

* * *

Q. What if anything, did he say?

A. He [Elliot] told me that, 'Bill, that wouldn't be a satisfactory arrangement. We have had Fred Barosso and we have had him for years and find that he is a poor business man. He does a good sale on the bars and on the off sale accounts but he is just not capable of running the business. We couldn't go along with that at all.'

Q. Was anything said by either of them about your having to associate and associate your name with such a separate operation if it developed?

A. Yes. Then Mr. Elliot told me, he says, 'No, Bill, *if we go into this kind of arrangement we want you to take your name or the Scanlan Distributing Company name and put it over our door where our products are,* and if we build a new building or if you build a new building and our products are in there *we want the name Scanlan Distributing Company. You can find a different name or run the other one or let Fred run the Hamm's end of the operation.'*

Q. Now, in connection with the prospects for Busch Bavarian in San Joaquin County and your part of it, what further was said at this meeting?

A. I reminded Mr. Elliott then, and he was sitting alongside of me, I went back and reminded him of the agreement that I felt was reached in the Eden Motor Lodge when he assured me that they had no plans for Busch Bavarian for California in the immediate future or the near future or the three to five years, or how it was answered.

* * *

Q. What did he state?

A. He just said, 'Bill, things have changed.'"

(RT 208:12-216:20.)

"Q. What, if anything, did Mr. Newhouse respond when you gave him this background and made this final statement?

A. Well, in one of these meetings at that time he made the statement, 'Well, Bill, would you like to get

out the way that you got in?' referring to my buying, buying Barosso out.

Q. Did you respond to that?

A. I said, 'Certainly, but are you authorized to offer this?'

Q. What, if anything did he respond?

A. No, he didn't reply to that.

Q. Now, did you have any further discussion with either of these men in relation to the distribution of Anheuser-Busch products following these discussions?

A. Yes, I did. Mr. Newhouse was in the market quite frequently and he always wanted to know what my plans were. *And I told him that my plans hadn't changed a bit,* that we had discussed the possibility of the building, that I had made some inquiries about this and that but ultimately *I would end up and say, 'George,—'* George Newhouse was the name—*'I am happy and content with the deal or arrangement that we made with Hamm's and Budweiser.* Why don't you go find someone else to carry the Busch Bavarian?' "

(RT 226:3-24.)

"Q. Now, have you related to us, as you now recall, the principal contacts you had with all of the brewery people from the meeting at the Fairmont up until early April around the 9th?

A. Yes.

Q. Now, on April 9th or thereabouts did you receive a call from anyone connected with the brewery?

A. Yes. When I returned to my office there was a return call for me from Mr. Elliott in Van Nuys that I should call him.

* * *

Q. Now, in this call was there any discussion about the *distribution of Anheuser-Busch products?*

A. *Mr. Elliott was apologetic and told me, 'Bill, we have found another wholesaler or somebody that is going to take on the Busch Bavarian line and they want the whole package.'* They was making arrangements to set up a distributorship and he felt real bad *but he was going to have to terminate me* or, in other words, that I had had it.

* * *

Q. Did he indicate when you would be no longer be able to distribute or buy for resale any of these products?

A. Yes. He said, 'Bill, now what is a good cutting off date for you?' Or, *'When can we cut you off?'*

* * *

Q. What did you say?

A. *I told him, 'George, I don't want to give up the line and you know that I don't want to give up the line.* This is your move and you're the one that is setting the date. You pick the time. It isn't my time to pick.'"

(RT 228:8-229:23.)

Appendix 8

ABSTRACTS OF TESTIMONY OF JOHN FLANIGAN (RT 1023-1031).

"Mr. Hutchinson: I think I should read the first one which appears at page 22, your Honor, because this occurred at the meeting with Mr. Scanlan *on the 8th,* as we understand it, of *February, 1963.*

'Q. Now, with respect to Hamm's in the discussion of Hamm's with Mr. Scanlan, *did he not ask you if you had on behalf of Anheuser-Busch discussed any of these rearrangements with the representatives of Hamm's?*

A. He did ask us that.

Q. Do you recall your reply?

A. I don't recall the reply exactly, but we had no definitive answer from Hamm's.'

I think that implies that they had discussed it certainly.

Then on page 29—I think this passage brings it up to the point where we are considering—page 29.

'Q. Was Mr. Scanlan as a result of this meeting of February to make any decision on that at the request of the brewery, namely, to give up or continue with Budweiser and Michlebo?

A. No. *The meeting in February occurred right after Hamm's officials had been to California and had fairly well stated their position, which was in opposition to a position that they took down south with Ace Beverage,* and I felt that although Mr. Fiege had been quite harsh on one of the Hamm's wholesalers while he was here, and this was general knowledge at the convention, I felt that Scanlan's picture was somewhat different, because of the territory, the problems of the territory, and that Mr. Fiege when he got

back to St. Paul would relent in this particular case and perhaps would let Bill work this out as we had discussed. I might point out that Mr. Elliott didn't share my opinion of Mr. Fiege's generosity.

Q. Did Mr. Fiege make whatever statements you are referring to to you?.

A. No.

Q. Were they recorded or reported in public prints?

A. No.

Q. Could you tell us the source of information as to what Mr. Fiege had said on the subject?

A. Walter Markstien.

Q. Markstien?

A. Yes. He was the wholesaler to whom he made them.

Q. *He is presently a distributor for this brewery, Anheuser-Busch?*

A. Yes, in San Francisco.

Q. And he was a year or two prior——

A. *He was a distributor for Hamm's and Budweiser for a number of years prior to that.*

Q. *When the Busch Bavarian situation developed, he ceased to be a distributor for Hamm's; is that right?*

A. *As a fact, yes.* When Busch Bavarian came into the market, he no longer distributed Hamm's.

Q. At the same time, you had another distributor in San Francisco; was it Rossi?

A. Rossi.

Q. And he had been distributing Anheuser-Busch products and what else?

A. Hamm's.

Q. *And as a result of Busch Bavarian, Rossi was terminated as Distributor to Anheuser-Busch products?*

A. *He was.*

Q. *And Markstien then took over the whole city?*

A. *The entire San Francisco City.*

Q. Now, with respect to Rossi, how did the termination of his relations with Anheuser-Busch come about?

A. Well, when it became evident that Markstein was no longer going to be able to keep Hamm's, and *since Rossi was an outgrowth of our original arrangements with Hamm's for distribution in San Francisco, we recognized that the Rossi area would have to be incorporated into the total San Francisco area,* and we therefore did not offer or suggest to Rossi that he take on Busch Bavarian. We told him what we were going to do out of courtesy. But we knew ahead of time that we would have to incorporate the entire matter to make it a reasonably economic situation.

Q. Was Rossi ever given a written notice of termination?

Mr. Hanger: A written notice of *determination.*

Mr. Hutchinson: Excuse me.

Q. Was Rossi ever given a written notice of determination?

A. I don't know.

Q. *Now, you said that you have an arrangement with Markstien and Rossi and Hamm's regarding distribution of Hamm's and Anheuser-Busch products. Do I understand that you had some arrangements with Hamm's at an earlier time on the subject?*

A. Hamm's and ourselves handled this as a brewery branch of the City of San Francisco originally, with the exception of the Rossi terri-

tory, which Hamm's was servicing through Rossi. We were both anxious to discontinue our branches and felt we could—with the dual volume be of interest to the wholesaler.

Q. *Prior to the Busch Bavarian situation, you had had meetings with Hamm's and discussed this business of distributors' territories and the like?*

A. Some years before this.

Q. Did you personally participate in these meetings or discussions?

A. In some of them.

Q. With whom did you talk on behalf of Hamm's?

A. I talked to Herm Newhouse, to Herschback, and, I don't think we talked to—no, I guess we talked to Herb Goodwin from time to time.

* * *

Q. *Now, by "Brewery branch",* I take it you mean that you kept a warehouse or some supply here in some fashion to supply other distributors than Markstein and Rossi; is that right?

A. No. *We operated as a wholesaler, as a—the brewery operated a distributorship as opposed to an independent distributor.*

Q. In other words, Anheuser-Busch actually had a selling operation here in San Francisco?

A. Correct.

Q. And how long did it continue?

A. Well, it continued off and on from about the time we came back into the market—it was an off-again-on-again sort of thing. We would have a wholesaler; then we would have a branch; then we would have a wholesaler, from about 1947 on.

Q. *It is your understanding, is it not, that the brewery could sell direct to retailers at any time anywhere in the State?*

A. *Yes.*

Q. So choosing a distributor was a matter of misjudgment rather than any restriction on the legal capacity of the brewery function?

A. Correct.'

* * *

The Court: Read that again. That seems to be the crux. This is in the February, 1963 area.

Mr. Hutchinson: Yes. I will start re-reading at page 33, line 9, which I think is the point the Court probably has in mind.

'Q. Now, what else with regard to Hamm's? When Rossi and Markstein were to change around, as you have indicated, *was there a further meeting between you and some Hamm's representative?*

A. *I had luncheon with Herm Newhouse* to see if I could determine their feelings on the matter, *since we had a number of Hamm's wholesalers, and since we were actually to—or since the wholesalers themselves were somewhat confused as to the position of Hamm's and where they were going to, what was going to happen, I was hopeful that I would be able to clear the air.* This luncheon was at the Fairmont Hotel and I think about the time of the February 8th meeting.

Q. Now, what was Herm Newhouse's office or title, if you know?

A. I believe he was Sales Manager, Northern California.

* * *

I think the other portions sort of carry forward the same ideas, though there may be something more specific."

(RT 1023:14-1031:25.)

Appendix 9

ABSTRACTS OF TESTIMONY OF CHARLES OROSOLINI (RT 542-547).

"Q. *Did Mr. Newhouse make a proposal to you or request you to consider distribution of Busch Bavarian?*

A. *Yes.* He wanted to know whether I was interested to carry Busch Bavarian. And I listened to his sales talk and he told me about his advertising, all that. *Then I finally asked him, I says, 'Well, it's kind of strange,' I says, 'that you are offering me Busch Bavarian. You have a distributor.' He says, 'Well, yes, that is right.' I said, 'Why don't Bill take it? He says, 'Well, Bill won't give up Budweiser.'*

* * *

Q. Who was identified as 'Bill'?

A. Scanlan.

Q. What were the brands of beer that he was distributing at that time?

A. *He was distributing Hamm's and that is the beer that he was going to throw out.*

Q. *Now the statement made by Mr. Newhouse was that they weren't going to give Busch Bavarian to Mr. Scanlan, or Bill, as you identified him?*

A. That is right.

Q. Because he wouldn't give up Budweiser, is that correct?

A. *No, because he wouldn't give up Hamm's.*

Q. Thank you. Now, this was the first meeting. Was there any second or later meeting with Mr. Newhouse?

A. Yes; about two or three days later Mr. George Newhouse came back and he had a representative from Budweiser.

* * *

Q. Now, did you have a conversation on the same general subject as the first one at this meeting?

A. No, the conversation that I had the second time was that he wanted to know *whether I would be willing to put in another barn, and in that way, then, I could have the three products of Budweiser.*"

(RT 542:7-543:24.)

* * *

"Q. Now, was there any suggestion that there might be a separate operation of any kind? Was that ever discussed?

A. That was the discussion that we had, that *they wanted me to set up another barn, a separate organization.*"

(RT 546:2-547:23.)

Appendix 10

ABSTRACTS OF TESTIMONY OF PETE GIAHOS (RT 442, 446, 458, 467, 532, 537, 538).

"Q. Perhaps I can state it a little more simply: In connection with the discussion of the Busch Bavarian merchandising program did either Mr. Flanigan or Mr. Elliott or perhaps someone else present point out to you the relative standing in sales of Lucky Lager, Hamm's and other beers?

Mr. Hutchinson: Q. Do you have the question now?

A. Yes.

Q. Now, at that time were you distributing any beer other than the Anheuser-Busch products, Budweiser and Michelob?

A. Yes.

Mr. Hutchinson: Q. What brands were you distributing?

A. We were handling Budweiser, Michelob, Falstaff, Regal, Rainier Ale, Bulldog Stout Malt Liquor and Mexicali.

Q. Now, other than the Budweiser and Michelob brands, those were manufactured and sold by breweries other than Anheuser-Busch, is that right?

A. Yes."

(RT 442:16-443:1.)

"Q. And if I understand then, Mr. George Newhouse was taking over the territory for them in lieu of Mr. Leadholm; is that correct?

A. I believe that is correct.

Q. Now, will you tell us, as best you remember, what you said and *what Mr. George Newhouse said to you in respect to changes, if any, that would occur or should occur in your distribution of various beers upon the advent of the Busch Bavarian beer distribution?*

Mr. Hanger: Same objection for the record.

The Witness: Our basic discussion at this point was that Mr. Newhouse led me to believe that *he couldn't formally tell me that I would be able to handle Busch Bavarian beer unless a competitive line of beer in my house was dropped.*

By Mr. Hutchinson:

Q. Did he indicate *what competitive brand was to be dropped?*

* * *

A. *Falstaff.*

Q. Was that a beer commonly referred to in the trade as a popular priced beer?

A. Yes, sir.

Q. And was that about all that Mr. Newhouse said at that time or was there something further?

A. Well, actually he was very new with the company at this point, and I think it was very embarrassing to him and I kept telling him that it was also very embarrassing to me, but that I felt that *I would like to keep my distributing company intact physically and I realized that he,* being new with the Anheuser-Busch Company, that he *was apparently attempting to convey to me what his company wanted or expected in our marketing area."*

(RT 446:6-447:15.)

"The Court: Well, Mr. Hanger, let me ask you a question. You don't have to commit yourself on this. But is there any dispute that, first of all, the Bud people said to Scanlan, 'We want you to handle Busch,' and further that because he did not handle Busch they took Bud away from him? *These are admitted facts, aren't they?*

Mr. Hanger: *Well, they took Bud away from him,* not specifically because he didn't handle Busch but for other reasons they couldn't find anybody else to handle it. I think that is an admitted fact.

The Court: Wait a minute. I missed you on that. *I asked you whether they took Bud away from Scanlan because he evidently never got around to giving them an answer as to whether he was going to handle Busch.*

Mr. Hanger: I think they took——

The Court: That is the way I interpret the evidence that has come in so far from him.

Mr. Hanger: *That's right,* they took Bud away from him. Now, I think they would have left Bud with Scanlan if they could have found another suitable distributor for Busch in the San Joaquin County. I think the evidence will reflect, and I think that it has already been testified to by Scanlan, that George Newhouse came to him and asked him who else would take it and he went and talked to all those people.

The Court: Let's concede that—I see your point. *There is certainly testimony to that effect on which a jury could reach that conclusion that they took Bud away from him because they wanted to be sure that*

they'd get a Busch distributor in San Joaquin County; he hadn't made up his mind as to whether he wanted to handle Busch; they couldn't get anybody else to handle Busch, *and evidently the only way they could get anybody to handle Busch was to tie it in with Bud.*

Mr. Hanger: Right. I don't like to use that expression 'Tie it in' but I think——

The Court: That was an unfortunate statement of mine in the presence of Antitrust lawyers. O.K. That they wanted to have the three of them sold together.

Mr. Hanger: The new distributor insisted on taking Bud and Michelob before he'd take Busch, and Mr. Scanlan's own testimony was that he didn't feel you could take that combination of three beers and make a profit of them, which is why he refused to take on Busch.

Mr. Hutchinson: *He wanted to handle them without restrictions. He didn't refuse to take it but——"*

(RT 458:6-459:24.)

"The Court: . . .

So maybe, Mr. Hutchinson, if you could prove a conspiracy in which Anheuser-Busch was involved, along with some other distributors, Dinubilo, we will say that they were going to make Mr. Giahos give up the sale of Falstaff beer and thus diminish or restrain competition that would otherwise be offered by Falstaff beer, then, if I read this portion of the Walker case correctly, if I understand it, *that would constitute a statement of a cause of claim and if it would be proved it would be a violation under Section 1 of the Sherman Act.*

Do you agree with that, Mr. Hanger?

Mr. Hanger: *I agree that if the brewery conspires with other distributors, say, in different territories, in different areas,——*

The Court: All right.

Mr. Hanger: *——To take a particular brand away from another distributor, under Walker the Court says they believe that may constitute a violation of the Sherman Act."*

(RT 467:7-24.)

"By Mr. Hanger:

Q. Mr. Giahos, you said you met with Mr. Flanigan and Mr. Elliott on February 8th or 7th, I believe, is that correct?

A. That is correct.

Q. Now, at that time, as you indicated on your direct examination, you had some five or six additional brands other than the Budweiser brand, correct?

A. That is correct.

Q. Including Falstaff, Regal, Rainier Ale, Bulldog Stout Malt Liquor and Mexicali, correct?

A. That is correct.

Q. *Now, at the February 7th meeting had you been asked to bring your total Falstaff sales for the preceding year?*

A. *Yes.*

* * *

Q. So that at the time of that presentation it was indicated to you on the basis of the projection that *if you substituted Busch Bavarian for Falstaff* you would, in fact, have more sales, is that not true?

A. That was the inference."
(RT 532:14-533:23.)

"Q. I take it then you did not independently determine, as a matter of business judgment, that Busch Bavarian was going to be better than Falstaff immediately?

A. It is very difficult to project that.

Q. *As a matter of fact, you urged, did you not, to both Mr. Elliott and Mr. Newhouse that you be permitted, if you had to give up something,* to give up a brand in which you had a smaller sales, including particularly Regal, is that not true?

A. I was willing at that time to give up a couple of lesser selling items. I don't think Regal was one of them because it wasn't a lesser selling item.

Q. At least lesser quantity?

A. Well, particular reference to items like Mexicali, Bulldog, and the Rainier.

Q. *Now, I think you stated in answer to a question by Mr. Hanger that after the Falstaff product was no longer distributed by you, it lost ground in the market, lost its sales, is that true?*

A. *That is correct."*
(RT 537:3-22.)

* * *

"Q. I see. Now, Mr. Flanigan did finally tell you that Anheuser-Busch would not raise objection if you took on Falstaff line again, is that true?

A. *I was permitted to do business with Falstaff again.*

Q. Now, you have had that line merely a year. Is that long enough to give an estimate as to the present annual sales of Falstaff in your territory?

A. *The present Falstaff sales are less than half of what they were when we gave it up.*

Q. Now, have you been, since you took back the Falstaff line for distribution, carrying out the usual distributor functions to the best of your firm's capacity?

A. In regard to——

Q. Falstaff.

A. Definitely."

(RT 539:7-21.)

Appendix 11

EXCERPTS OF PROVISIONS OF SECTIONS 16700 THROUGH 16757 OF THE BUSINESS AND PROFESSIONS CODE, STATE OF CALIFORNIA, INCLUDING QUOTATIONS FROM SECTIONS 16720, 16727, 16750, 16755, AND 16757.

"§ 16720. A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

"(a) To create or carry out restrictions in trade or commerce."

* * *

"(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity."

"§ 16727. It shall be unlawful for any person to . . . make a sale or contract for the sale of goods, merchandise, machinery, supplies, commodities for use within the State, . . . on the condition, agreement or understanding that the . . . purchaser thereof shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of a competitor or competitors of the . . . sellers, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition . . . in any section of the State."

"§ 16750. (a) Any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor in any court having jurisdiction in the county where the defendant resides or is found, or where service

may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him, and shall be awarded a reasonable attorneys fee together with the costs of suit."

"§ 16755. (a) Any violation of this chapter is a conspiracy against trade, and any person who engages in any such conspiracy or takes part therein, or aids or advises in its commission, or who is principal, manager, director, agent, servant or employee, or in any other capacity, knowingly carries out any of the stipulations, purposes, prices, rates, or furnishes any information to assist in carrying out such purposes, or orders thereunder or in pursuance thereof, is punishable . . ."

"§ 16757. (a) In prosecutions under this chapter, it is sufficient to prove that a trust or combination exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement, or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all.

"(b) The character of the trust or combination alleged may be established by proof of its general reputation as such."

Appendix 12

ABSTRACTS FROM MEMORANDUM AND ORDER DENYING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

"A brewery and its distributors can form a conspiracy. The plaintiff need not sue all of the conspirators, and he need not allege the names or descriptions of the conspirators not sued (*Walker Distributing Co. v. Lucky Lager Brewing Co.*, supra at page 8). Accordingly, on their face Counts I and IV state a claim upon which relief can be granted." (CT 345).

* * *

"However, other portions of plaintiff's deposition indicate that defendants did refuse to deal with plaintiff unless he would cease dealing with Hamm's.[1] On the whole, the testimony in the materials submitted does not unequivocally refute the assertion that defendants refused to deal with plaintiff for the reasons alleged in the complaint. The Court cannot, therefore, find that there is no genuine issue as to any material fact with respect to Counts I and IV of plaintiff's complaint."

"[1] . . . counsel have agreed, for purposes of this motion, that on page 89 thereof plaintiff stated 'John [Flanigan] admitted he realized that fact [that plaintiff could not afford to give up Hamm's] but he also stated Busch could or would not be under the same roof with Hamm's. I would either have to go along with them without Hamm's or attempt to set it up separate. He insisted that only Bud and Busch would go on the trucks.'(CT 346.)"